See Vols.
3353
3354

IN THE

United States Court of Appeals For the Ninth Circuit

No. 20074

K-91, Inc.,
Appellant,

v.

Gershwin Publishing Corporation, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

APPELLANT'S PETITION FOR REHEARING

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SUBJECT INDEX

TABLE OF CASES

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GROUNDS

Pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, appellant hereby petitions the court for a rehearing upon the following grounds:

ASCAP and the Antitrust Laws

1. The opinion by the court recites that appellant contended that appellees and ASCAP were misusing their copyrights in violation of public policy generally, apart from the federal or state antitrust laws. This was the precise grounds upon which *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (1948) and *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (1948) were decided against ASCAP. Yet the court failed to answer this contention, to analyze or distinguish it, or even cite one case to the contrary.

2. The court admitted that the prime issue of whether a consent decree can immunize against further prosecution for violation of the antitrust laws was a "very perplexing problem." Then it wholly failed to answer the issue stating that the antitrust laws were not violated because the consent decree disinfected the ASCAP combination. Such an analysis only begs the original question by circular reasoning.

3. The court ruled that there were no violations of the antitrust laws for two reasons, both of which are clearly erroneous: (1) the consent decree provides that the United States District Court for the Southern District of New York (Judge Ryan) may "fix a reasonable fee," and (2) the ASCAP affiliation contracts are nonexclusive.

In so ruling the court ignored, and failed to distinguish or even *cite,* the cases such as *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927) all holding that price fixing is a *per se* violation and that the reasonableness or unreasonableness thereof is immaterial. Even Judge Ryan himself, who presides over the ASCAP consent decree, has ruled that collective licensing of copyrighted works is not absolved from antitrust violations by ". . . the good motives of the parties nor the reasonableness of the price set." *Affiliated Music Enterprises v. Sesac, Inc.,* 160 F. Supp. 865, 875 (1958).

The second reason given by this court that appellees and ASCAP do not violate the antitrust laws (that the licenses are exclusive) also ignores every case that has passed on this very question. The *Alden-Rochelle* case, *supra,* and *M. Witmark & Sons* case, *supra,* both ruled against ASCAP when it defended on the basis of the nonexclusivity of its licensing, not to mention the voluminous other cases cited in appellant's brief on appeal. Again this court failed to distinguish, acknowledge or even *cite* this long line of cases. And again Judge Ryan has ruled that affiliation agreements for pooling copyrighted works, even where per piece licenses are *available,* are an illegal ". . . sharing of revenue struck down as violative of Section 1 of the Sherman Act. . . ." *Affiliated Music Enterprises v. Sesac, Inc., supra,* at p. 875.

4. Among the many other antitrust violations argued by appellant and appellees that were ignored by the court are the patently obvious pooling and tying agreements that are the cornerstone of ASCAP's very foundation. Again the court failed to distinguish or cite even *one* of the multitude of cases holding pooling agreement violations *per se*. Again, the court has ignored the teachings of the court presiding over ASCAP's consent decree, Judge Ryan, that ". . . pooling agreements are *per se* violations of the antitrust laws." *Affiliated Music Enterprises v. Sesac, Inc., supra*, at p. 875. It seems inconceivable that the opinion failed to even consider or recognize such unequivocal teachings of the Supreme Court that "tying arrangements" of copyrighted materials *could* perhaps "rarely" not violate the antitrust laws, "However, we find it difficult to conceive of such a case. . . ." *United States v. Loew's Inc.*, 371 U.S. 38, 49 (1948). If this is such a "rare" case that the Supreme Court has difficulty even *conceiving* it, it would appear rather compelling that this court describe why this is such a case.

5. The opinion ignores many of the stipulated facts such as Stipulated Fact 50 of the Pretrial Order (R. 30, Fact 50), that the negotiation of individual licenses is virtually impossible. This one fact alone is totally inconsistent with the opinion's determination that the preservation of individual licensing rights by individuals purifies the otherwise illegal activities of appellees and ASCAP. And again the many cases cited by appellant are omitted from distinction or even recognition. Again no heed whatsoever is paid to the Judge presiding over ASCAP's consent decree, as when Judge Ryan held that making "per piece" licenses available as the alternative to blanket licenses is merely the "lesser of two evils" with ". . . no 'genuine economical choice' between the two types of licenses." *Affiliated Music Enterprises v. Sesac, Inc., supra*, at p. 875. Or, as one trial court judge in the State of Washington just weeks ago held regarding ASCAP's consent decree's so-called disinfection of ASCAP's violations, ". . . this is so impractical it is no alternative at all." *Cascade Broadcasting Co. v. ASCAP*, Superior Court of the State of Washington, Yakima County, No. 45877.

ASCAP AND THE WASHINGTON STATE ANTITRUST LAWS

6. The opinion's finding that "appellant could have obtained a license from ASCAP, valid under Washington law so far as this record before us discloses" simply ignores the record and cites a letter dated in 1948 from the Washington Attorney General that ASCAP issues per piece licenses. *The record discloses without contradiction* that the only licenses available to radio stations in Washington *at the time of the infringement* were the two ASCAP forms of blanket licenses. What the situation was in 1948 is not in the record or even relevant. The per piece licenses filed with the Secretary of State were available only to non-broadcasters who were not even licensed. Defendants' Exhibits 7, 8, 8-A, Schedule 11. Hence, the opinion ignores the *record*, and erroneously refers to a 1948 hearsay letter that is inconsistent with a subsequent opinion from the Attorney General, dated June 8, 1962. Defendants' Ex. A-13, A-14. We can only conclude that the court mistakenly read the record.

7. For the same reason the opinion erred in finding that appellant failed to apply for a license. As just stated, blanket licenses were the only kind available. Per piece licenses were not available to broadcasters.

8. For the same reason the opinion is in error in placing significance on the finding of the trial judge that ASCAP has not received any request from a broadcaster for the issuance of a license to perform one or more specified compositions. They were not available, notwithstanding what the Attorney General may have opined nineteen years ago. The error is compounded in failing to recognize Agreed Fact 27 (R. 30, Fact 27), that appellants "did not ask for per piece licenses from individual plaintiffs, because to do so would have been a useless and futile act." The error is compounded further in overlooking that on many occasions broadcasters asked for per piece licenses from ASCAP and were always refused. Defendants' Exs. A-15 through A-22. (See Appellant's Brief, pp. 48-49).

CONCLUSION

In view of the fact that the trial court announced at the opening of the trial that the case had to be tried in one day, the court forced appellant to introduce all exhibits virtually in a pile at one time without an opportunity to logically present them, and generally made shambles out of the record, it is not difficult to understand why this court would have such difficulty with the record. Still, it should not be ignored. Nor should an admittedly "very perplexing problem." Nor should the authoritative cases. If they can be distinguished they should be. It is urgent to all users of music. Even now ASCAP continues to bring similar suits against broadcasters in the State of Washington. It has recently included the hotel industry. All need the court's complete scrutiny of the record. All need a decision that cites the legal precedents, analyzes them and provides some guidance. On rehearing and reconsideration reversal must logically follow.

Respectfully submitted.

Ronald A. Murphy
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in my judgment this Petition for Rehearing is well founded and is not interposed for delay.

Ronald A. Murphy
Attorney for Petitioner